Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

No. 92-784

In the Supreme Court of the United States

OCTOBER TERM 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC., and FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN and KIM LITTLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
OKLAHOMA SUPREME COURT

REPLY TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS

1. Is the expression attendant to the initiative petition process, from certification through voting, core political speech?

2. Does Oklahoma law, as construed and applied, violate the First and Fourteenth Amendments as a prior restraint on core political speech when the Oklahoma Supreme Court strikes from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision?

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OPINION BELOW

The Oklahoma Supreme Court's opinion (App. 1a-52a) has been published at 838 P.2d 1 (Okla. 1992).

ARGUMENT

INTRODUCTION

Three briefs were filed in opposition to the petition for certiorari in this case. The Respondents and the Oklahoma Attorney General variously represented to this Court, inter alia:

- that the Oklahoma Supreme Court did not concern itself with State Question 642's subject, ideas, and messages (even though that court struck the measure from the ballot because its content may be presently unconstitutional);
- that there is no pressing need for this Court's decision on Petitioners' questions (even though two other jurisdictions have struck down initiatives based on their content since State Question 642 was stricken);
- that the First Amendment issue was not raised below (even though the first proposition of the Petitioners' July 24, 1992, brief to the Oklahoma Supreme Court was devoted to core political speech);
- that the striking of State Question 642 from the ballot did not infringe on the free expression of ideas in Oklahoma (even though, today, the billboards have been taken down and the bumper stickers gather dust in storage);
- that politicians conduct a "more cautious and deliberative legislative process" than a direct vote of the people (even though a law enacted through an initiative of the people is the product of pure democracy, unsullied by the political gamesmanship of legislators).

The foregoing examples, along with the balance of the opposition briefs, fail to answer the fundamental question: whether the Oklahoma Supreme Court may strike from the ballot a state question solely because its content is contrary to a U.S. Supreme Court decision, thereby excluding the Petitioners' viewpoints and ideas from a First Amendment forum. In this reply, Petitioners will address but a few of the arguments presented by Respondents and the Oklahoma Attorney General.

JURISDICTION

Feldman and Little contend at page 15 of their brief that Petitioners could have appealed part I of the Oklahoma Supreme Court's August 4, 1992, opinion. Part I is nothing

more than an advisory opinion on the constitutionality of State Question 642. Petitioners could not appeal to this Court part I of the Oklahoma Supreme Court's judgment. Neither Supreme Court Rule 10 nor 28 U.S.C. § 1257(a) provides for an appeal to this Court concerning the constitutionality of a proposed statute. This Court does not review the constitutionality of proposed statutes.

This Court is not being asked to review the Oklahoma Supreme Court's advisory interpretation of federal constitutional law. Instead, the Petitioners seek reversal of part II of the August 4, 1992, decision, which violated the First Amendment. This Court has jurisdiction to determine if core political speech was denied. If this Court determines that the expression attendant to the initiative petition process from certification through voting is core political speech, then the judgment of the Oklahoma Supreme Court should be reversed and remanded for completion of the initiative petition process.

SINGLE DISPOSITIVE ISSUE

Beginning at page 6 of their brief, Respondents Feldman and Little argue that State Question 642 has been disposed of on state grounds. Feldman and Little initially raised below a number of legal issues. But, the Oklahoma Supreme Court opined that the single dispositive issue was the constitutionality of State Question 642. The Oklahoma court reached the constitutionality of State Question 642 by construing and applying Oklahoma law in a way that restrained core political speech in violation of the First and Fourteenth Amendments. It was the Oklahoma Supreme Court's construction and application of state law that framed the Petitioners' First Amendment case.

THE ARGUMENT BELOW

The Oklahoma Attorney General contends that Petitioners did not preserve the core political speech argument below. The first proposition of Petitioners' July 24, 1992, brief in the Oklahoma Supreme Court (App. 59a) addressed the issue of core political speech. Petitioners specifically argued that the

Oklahoma Supreme Court's review of the constitutionality of State Question 642 was itself unconstitutional under the First and Fourteenth Amendments.

The Oklahoma Attorney General also contends that the issue was raised, if at all, at the "eleventh hour" in a final brief and that the Attorney General had no opportunity to respond. However, the Oklahoma Supreme Court's July 14, 1992, briefing order required the filing of simultaneous briefs, thus affording no one an opportunity to respond. There was no reason to raise the First Amendment argument until the Oklahoma Supreme Court sua sponte decided to review the content of State Question 642. The core political speech issue was timely raised.

VIEWPONT CONTROL

Feldman and Little argue at page 9 of their brief that the Oklahoma Supreme Court "did not in any way concern itself with either the subject matter of the initiative petition or the ideas and messages it reflected." By "ideas and messages" the Respondents apparently refer to viewpoint. While the Respondents suggest the Oklahoma Supreme Court was blind to the viewpoint of State Question 642, the court's decision to strike the measure from the ballot was based on nothing other than State Question 642's content. When the Oklahoma Supreme Court picks and chooses among initiative petitions to appear on the ballot, it focuses directly on the content of each state question and makes its decision based upon that content.

Feldman and Little contend at page 6 of their brief, that the burden upon the First and Fourteenth Amendment rights of voters by the Oklahoma Supreme Court's construction and application of Oklahoma law is "modest." Content control of core political speech, no matter how "modest," will not withstand the exacting scrutiny test of *Meyer v. Grant*, 486 U.S. 414 (1988).

CONFLICT AMONG THE STATES

Contrary to the statements made by the Oklahoma Attor-

ney General and the "numerical sufficiency" Respondents,[1] the petition for certiorari discussed the conflict among the states concerning the issue of presubmission content review. This conflict demonstrates an immediate need for this Court to resolve the issue.

One month after the Oklahoma Supreme Court struck State Question 642 from the ballot because of its content, the Nevada Supreme Court struck an initiative petition from the ballot also because of its content.[2] Then, in October, a District of Columbia court held that it too could perform presubmission content review.[3] There is immediate need for this Court to review the recurring usurpation of the people's First Amendment rights in initiative petition jurisdictions throughout the nation.

BALLOT ACCESS

Respondents cite *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), for the proposition that there is no First Amendment right to use the election process. *Burdick*, however, is a ballot access case. Ballot access cases concern political association or the election of candidates. *Clements v. Fashing*, 457 U.S. 957, 964 (1982). Respondents are trying to transform this core political speech case into a ballot access case. The issue is not whether Oklahoma law as construed and applied is politically neutral, but whether it is content neutral under the First Amendment. The advocacy attendant to the passage

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[1] On December 16, 1992, the numerical sufficiency protestants below, Taliaferro, Fleischaker, and Tevington, filed a brief in opposition to the October 29, 1992, petition for a writ of certiorari. These "numerical sufficiency" Respondents do not address anywhere within their brief in opposition their standing to challenge the petition for certiorari. These "numerical sufficiency" Respondents did not raise any legal or constitutional issues below and strictly confined their independent proceeding to the number of signatures presented in support of State Question 642. Taliaferro, Fleischaker, and Tevington lack standing in the legal sufficiency proceeding filed by Feldman and Little.

[2] *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992).

[3] *Hessey v. Burden*, 615 A.2d 562 (D.C. 1992).

or defeat of initiative petition legislation is core political speech. *Meyer*, 486 U.S. at 428.

UNCONSTITUTIONAL LEGAL REQUIREMENTS

The "numerical sufficiency" Respondents state at page 5 of their brief in opposition:

> Nothing in *Meyer* supports the view that there is a First Amendment right to cast a ballot on an initiative that fails to meet a state's legal requirements for placement on the ballot.

Feldman and Little made a similar argument. If the state's requirements for placement on the ballot involve the construction and application of state law so that initiative petition proponents may have initiatives on some subjects or viewpoints but not other subjects or viewpoints, then those requirements are unconstitutional under the First Amendment.

PRESUBMISSION REVIEW VERSUS POSTENACTMENT REVIEW

Respondents argue that Petitioners' position would undermine the role of the judiciary as the ultimate arbiter of the constitutionality of legislation. Certainly, this Court is the ultimate judge of the constitutionality of enacted law. The question is whether the highest court of a state can perform presubmission content review to restrict the people's debate of and vote upon citizen-initiated legislation that has not yet become law. If the people enact the proposed legislation, then, of course, the judicial branch of government may review its constitutionality. But the judicial branch of state government should not sua sponte inject itself into the initiative petition process to censor a viewpoint from the people's debate and vote.

VOTER "PROTECTION"

The "numerical sufficiency" Respondents argue at page 9 of their brief that presubmission constitutional review is "an effective method of voter protection." State government should not be allowed to tell the people what they may

express through the initiative petition process simply because a branch of state government (e.g., the judicial branch of Oklahoma) does not like what the people are saying. The people do not need to be protected from themselves by a paternalistic state judiciary.

STATE'S RIGHTS

The First Amendment protects free speech from interference by the government, either by the judicial branch or the executive branch. The Oklahoma Supreme Court now controls the content of initiative petitions. If the content is not "proper" according to the Oklahoma Supreme Court, then the measure will not be certified and the expression attendant to the initiative petition process from certification through voting will never occur. Similarly, the Attorney General relies on the argument that Colorado unsuccessfully used in *Meyer*, i.e., that since the initiative is a creation of the state, the state may fetter the initiative petition process. Although a state is not obligated to create a forum for core political speech, once it does so, it may not control the content or viewpoint of the speech occurring therein. *Meyer*, 486 U.S. at 420.

QUANTUM

The "numerical sufficiency" Respondents and the Oklahoma Attorney General suggest that Oklahoma law as construed and applied does not limit speech and that Petitioners are free to discuss the subject of State Question 642 by any means they desire. The Petitioners desire to utilize the initiative petition forum in its entirety. Under *Meyer*, Petitioners are allowed to select the forum for their speech. The initiative petition forum, from circulation through voting, affords an extensive quantum of speech. This Court held in *Meyer* that, when the quantum of the debate is reduced, an impermissible restriction on First Amendment speech occurs. 486 U.S. at 423.

CIRCULATION THROUGH VOTING

Feldman and Little admit at page 15 of their brief that the

content of initiative petitions cannot be controlled during the circulation phase but argue that, as one approaches the election and the core of the electoral process, the state may regulate the content of initiative petitions and eliminate some initiatives based on content alone. Respondents apparently believe that more First Amendment protection should be afforded core political speech occurring at the periphery of the initiative petition process than during the campaign or the vote upon the initiative petition in question. There is, however, no First Amendment difference between core political speech occurring during the circulation period versus the campaign period.

THE THOUGHTFUL PART OF THE NATION

Feldman and Little complain at page 4 of their brief that State Question 642 was intended as a test case. If State Question 642 is approved by the voters, however, it will be Oklahoma law. This was the Petitioners' short term goal. Their long term goal was to have the statute upheld by this Court through a change in constitutional law, because no one except this Court can conclusively say what is or is not constitutional.

Constitutional law can change. If this were not true, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), would not have been partially overruled in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Feldman and Little argue at page 11 of their brief, "It is self-evident that no one is entitled to have unconstitutional laws enacted and preserved." According to that theory, the Pennsylvania legislature could never have enacted the statute addressed in *Casey*.

In *Casey*, this Court discussed the holdings in *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). This Court explained that these decisions were ultimately overruled in spite of stare decisis because there came a point in time when "the thoughtful part of the

Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Casey*, 112 S. Ct. at 2813. Petitioners submit that initiative petition signers, debaters, and voters are included within the "thoughtful part of the Nation." The people cannot make known to this Court the fact that they can accept a decision to overrule a prior case if the forum for making that communication is closed by the highest court of a state.

CONCLUSION

Petitioners request that their petition be granted, that the judgment of the Oklahoma Supreme Court be vacated, and that this Court remand the case to the Oklahoma Supreme Court for completion of the initiative petition process.

Respectfully submitted,

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